

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs September 26, 2006

**JOSE CARRILLO v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Davidson County**  
**No. 2003-C-2391 Cheryl Blackburn, Judge**

---

**No. M2005-02963-CCA-R3-PC - Filed December 20, 2006**

---

The petitioner, Jose Carrillo<sup>1</sup>, appeals from the post-conviction court's denial of post-conviction relief. On appeal, he contends that he received the ineffective assistance of counsel which caused him to enter an unknowing and involuntary guilty plea. Following our review of the record and the parties' briefs, we affirm the judgment of the post-conviction court denying post-conviction relief.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

Nathan Scott Moore, Nashville, Tennessee, for the appellant, Jose Carrillo.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Bret Thomas Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The petitioner was indicted for two counts of selling heroin. Pursuant to a plea agreement, the petitioner pled guilty to one count of possession of heroin with the intent to sell. Following a sentencing hearing, he received an eight-year sentence to be served concurrently with another sentence. Subsequently, the petitioner filed a pro se petition for post-conviction relief. Thereafter, counsel was appointed, an amended petition was filed, and an evidentiary hearing was held.

At the hearing, the petitioner, through an interpreter, testified that prior to entering his guilty plea, his defense counsel talked with him a few times about pleading guilty. The petitioner stated that trial counsel advised him to take the state's offer of eight years to be served concurrently with his other sentence rather than go to trial and risk a sentence of twelve years to be served

---

<sup>1</sup> We note that the petitioner signed his name "Jose H. Carrillo" on his pro se petition.

consecutively to his other sentence. The petitioner stated that he did not know if counsel investigated his case, but he claimed that she did not speak with him about any investigation. The petitioner recalled that counsel advised him that he had a right to go to trial but told him that in her opinion he would lose and “could receive more time.” The petitioner claimed that he did not want to plead guilty but did so in order to avoid a longer sentence. The petitioner stated that he felt counsel had to a “certain extent” forced him to enter a guilty plea. The petitioner further complained that counsel was not present at the plea hearing but had arranged for a substitute attorney from the Public Defender’s Office to be present. On cross-examination, the petitioner asserted that he lied when he told the court he was satisfied with counsel’s representation, when he agreed with the prosecutor’s recitation of the facts, and when he told the court he understood the potential sentence he would receive.

Counsel testified that she advised the petitioner to accept the state’s offer of an eight-year sentence to be served concurrently with another sentence. Counsel recalled that she spoke with agents from the Tennessee Bureau of Investigation about the petitioner’s case “on several occasions.” Based upon those conversations and the information she received in discovery, counsel felt that a concurrent sentence of eight years was the best deal the petitioner was going to get. Counsel testified that she discussed the plea agreement with the petitioner and believed he understood the agreement. She asserted that had she thought the petitioner did not understand the plea agreement, she “would not have allowed him to enter the plea.” On cross-examination, counsel stated that she and her interpreter both were proficient in Spanish.

Following the evidentiary hearing, the post-conviction court entered an order denying post-conviction relief. Among other things, the court found that the petitioner failed to prove by clear and convincing evidence that counsel was ineffective or that the petitioner’s plea was unknowing and involuntary.

## ANALYSIS

The petitioner contends on appeal that the post-conviction court erred in finding that he received the effective assistance of counsel and that he entered a knowing and voluntary guilty plea.

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court’s findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court’s factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court’s legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

To establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must show a reasonable probability that, but for the errors of his counsel, he would not have pled guilty. *See Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366 (1985); *Adkins v. State*, 911 S.W.2d 334, 349 (Tenn. Crim. App. 1994). A fair assessment of counsel's performance, "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 697; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Strickland*, 466 U.S. at 697.

In the instant case, the record fully supports the post-conviction court's findings that the petitioner received the effective assistance of counsel. As the post-conviction court found, the record reflects that the petitioner faced a potential thirty-two-year-sentence as he could have received up to twelve years for each drug offense, and each sentence could have been run consecutively to a previously imposed eight-year sentence. The record also reflects the fact that counsel investigated the petitioner's case and correctly informed him about his potential sentence and his available options, including going to trial. The record further reflects that counsel informed the petitioner about the likelihood of success and exposure to a much longer sentence should the case proceed to trial. In short, there is no evidence that counsel was deficient in her representation or that the petitioner would not have pled guilty but for counsel's errors. Accordingly, the petitioner is not entitled to relief.

As an interrelated matter, the petitioner contends that his guilty plea was not knowing or voluntary. He argues that he was induced into pleading guilty because his counsel did not properly investigate his case and told him he could receive a harsher sentence should his case go to trial.

A petitioner may successfully contest a conviction when his or her guilty plea is unknowing or involuntary. *See* Tenn. Code Ann. § 40-30-103; *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977). A plea is not "voluntary" if it results from ignorance, misunderstanding, coercion, inducements or threats. *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is "knowing" by questioning the defendant to make sure he or she fully understands the plea and its

consequences. *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999); *Blankenship*, 858 S.W.2d at 904. When determining the knowing and voluntary nature of the guilty plea, the trial court must consider the totality of “various circumstantial factors,” including:

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

*Blankenship*, 858 S.W.2d at 904 (citations omitted). A petitioner’s solemn declaration in open court that his or her plea is knowing and voluntary creates a formidable barrier in any subsequent collateral proceeding because these declarations “carry a strong presumption of verity.” *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

In the instant case, the transcript of the plea hearing reflects that the petitioner used an interpreter when entering his guilty plea. The petitioner informed the court that he understood the charges against him and the sentence he could possibly receive. The petitioner stated that he had talked with counsel about his case and understood the plea agreement. The petitioner further informed the court that he understood he did not have to plead guilty but chose to accept the plea agreement. The petitioner also stated he was satisfied with counsel’s representation. Accordingly, the evidence in the record does not preponderate against the court’s findings that the petitioner’s plea was knowing and voluntary. Therefore, the petitioner is not entitled to relief.

### CONCLUSION

Based on our review, we conclude that the petitioner has failed to show either that counsel was ineffective or that the petitioner’s guilty plea was unknowing and involuntary. Accordingly, we affirm the denial of the petitioner’s petition for post-conviction relief.

---

J.C. McLIN, JUDGE